

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<div>SUMMIT CARBON SOLUTIONS, LLC,  Petitioner,  v.  IOWA UTILITIES BOARD,  Respondent.</div>	<div>CASE NO. CVCV062900  <b>RESISTANCE TO MOTION TO ADMIT SUMMARY JUDGMENT RECORD</b></div>
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**RESISTANCE TO MOTION  
TO ADMIT SUMMARY JUDGMENT RECORD**

COMES NOW the Iowa Office of Consumer Advocate (OCA) and submits the following Resistance to Motion to Admit Summary Judgment Record filed by Summit Carbon Solutions, LLC (Summit) on June 27, 2022.

**INTRODUCTION**

Summit filed a Petition for Temporary and Permanent Injunctive Relief on December 14, 2021. The Court issued an Order Granting Motion for Temporary Injunction on February 11, 2022. All parties, including OCA, Summit, Sierra Club Iowa Chapter (Sierra Club), and the Iowa Utilities Board, agreed to a Trial Scheduling and Discovery Plan, which was completed and filed by Summit's attorney on February 23, 2022. That plan was approved and a trial date of July 7, 2022 was set in an Order Setting Trial and Approving Plan, issued on February 28, 2022.

On March 21, 2022, Sierra Club filed a Motion for Summary Judgment. After briefing and oral arguments, the Court issued an Order Denying Motion for Summary Judgment on June 2, 2022. Pursuant to the Order Denying Motion for Summary Judgment, material issues of fact remain to be determined at the July 7, 2022 trial.

## ARGUMENT

### **A. Summit's Motion Should Be Rejected Because It Is Untimely.**

As an initial matter, OCA objects to the admission of the summary judgment record into evidence in this proceeding because Summit's Motion was untimely filed. The Trial Scheduling and Discovery Plan, which was completed, signed, and filed by Summit's attorney on February 23, 2022, states that all pre-trial submissions, including motions in limine, will be filed fourteen days before the trial date. (Section 9(B)). This Court issued an Order Setting Trial and Approving Plan on February 28, 2022, which approved the terms of the Trial Schedule and Discovery Plan filed by Summit and scheduled a non-jury trial for July 7, 2022. The Order Setting Trial and Approving Plan clearly states, "**Any changes of the pretrial deadlines will require prior written court approval, even if agreed to by the parties.**" (emphasis in original). (Section 3).

Iowa Rule of Civil Procedure 1.602(5) states, "If a party or a party's attorney fails to obey a scheduling or pretrial order . . . the court, upon motion or upon the court's own initiative may make such orders with regard thereto as are just." With a trial date of July 7, the deadline to file motions in limine was June 23, 2022. Summit filed its Motion on June 27, 2022. Despite having known the trial date since February 28, Summit offered no explanation for its failure to file the Motion in a timely manner. Because Summit failed to comply with pre-trial procedures designed to give opposing parties sufficient time to prepare for trial, OCA urges this Court to deny the Motion to Admit Summary Judgment Record.

### **B. The Summary Judgment Record Is Not Admissible Evidence.**

Summit's Motion should also be rejected because the summary judgment record does not satisfy evidentiary standards for admissibility. At summary judgment, the form of the evidence

submitted is of little relevance as long as the content of the evidence would be admissible at trial. *Kindig v. Newman*, 966 N.W.2d 310, 322 (Iowa Ct. App. 2021). The credibility of testimony cannot be determined at summary judgment and must be assessed by the trier of fact. *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W.2d 772, 776 (Iowa 2010). Additionally, the non-moving party – in this case Summit – is entitled to “all legitimate inferences” about evidence at summary judgment. *Ne. Cmty. Sch. Dist. v. Easton Valley Cmty. Sch. Dist.*, 857 N.W.2d 488, 492 (Iowa 2014) (quoting *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006)). Summit is not entitled to those same favorable inferences at trial. Thus, a lack of objections about the accuracy or veracity of evidence at the summary judgment stage does not indicate a lack of objections to admission of that same evidence at trial.

Here, the *content* of the evidence presented during summary judgment arguments would be admissible at trial. However, the *form* in which the evidence was presented at summary judgment is not admissible at trial. For discovery responses to be admitted into the factual record, a witness must testify to their authenticity. Iowa R. Evid. 5.901. Other parties must also have the opportunity to test that witness’s credibility and veracity. *Avery v. Harms Implement Co.*, 270 N.W. 2d 646, 650 (Iowa 1978). The materials that Summit references from the summary judgment record – discovery responses and lists of documents – are not admissible as evidence unless they are introduced through the trial testimony of a witness who can authenticate those materials and be questioned about their content.

OCA does not disagree with Summit’s statement that this proceeding bears many similarities to an administrative appeal. However, the Court’s Order Denying Motion for Summary Judgment clearly identified a material issue of fact that needs to be resolved at trial: whether Summit provided the landowner list to the Iowa Utilities Board voluntarily or pursuant

to Board procedure. (Order at 2). This issue was not considered by the Iowa Utilities Board. There is no factual administrative record nor order from the Board available for the Court to review. Summit has had ample opportunity to identify witnesses and evidence that support its position. Summit is also within its rights to not present a witness at trial. But a trial is inherently a fact-finding procedure, and Summit should not be allowed to circumvent evidentiary rules that exist for the fairness of all parties simply because the central question originated in an administrative proceeding.

### **CONCLUSION**

The Order Denying Motion for Summary Judgment clearly identified a material issue of fact that needs to be determined at trial. Denying other parties the opportunity to test the credibility and validity of evidence from the summary judgment record is not a proper way for Summit to prove its case. Summit also failed to comply with the Trial Scheduling and Discovery Plan that was signed and filed by its own attorney and filed its Motion late. For these reasons, OCA respectfully requests that the Court deny Summit's Motion to Admit Summary Judgment Record.

Respectfully submitted,

Jennifer C. Easler, AT0002175  
Consumer Advocate

/s/ Anna K. Ryon  
Anna K. Ryon, AT0010763  
Attorney

1375 East Court Avenue  
Des Moines, IA 50319-0063  
Telephone: (515) 725-7200  
Email: IowaOCA@oca.iowa.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on June 30, 2022, the foregoing document was filed with the Clerk of Court using the EDMS system which will send electronic notice of the filing to the parties of record and served on Sierra Club Iowa Chapter pursuant to Iowa Court Rules.

/s/ Anna K. Ryon  
Anna K. Ryon